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Practice and Procedure

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PRACTICE AND PROCEDURE

I. IN PERSONAM JURISDICTION

In *Yarborough & Co. v. Schoolfield Furniture Industries, Inc.*,[1] creditors of a domestic corporation wholly owned by a foreign corporation brought suit against the foreign parent on the debts of the subsidiary. The South Carolina Supreme Court refused to sanction the exercise of *in personam* jurisdiction over the foreign corporation, holding that "the mere acquisition and control of a domestic subsidiary's capital stock does not subject the foreign parent to the jurisdiction of [this] State's courts."[2]

Schoolfield Furniture Industries, Inc., a wholly owned subsidiary of Hickory Furniture Company,[3] operated a furniture plant in South Carolina. In a suit against Hickory, Schoolfield's unsecured creditors effected personal service of process on Hickory in North Carolina pursuant to sections 36-2-803[4] and 33-23-

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1. ___ S.C. ___, 268 S.E.2d 42 (1980).

2. *Id.* at ___, 268 S.E.2d at 44.

3. Hickory Furniture Company is a Delaware corporation with its principal place of business in North Carolina.

4. S.C. CODE ANN. § 36-2-803 (1976) provides:

(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in the State;

(c) commission of a tortious act in whole or in part in this State;

(d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State; or

(e) having an interest in, using, or possessing real property in this State; or

(f) contracting to insure any person, property or risk located within this State at the time of contracting; or

(g) entry into a contract to be performed in whole or in part by either party in this State; or

(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be

140(d)[5] of the South Carolina Code. When Hickory appeared specially and moved to quash service for lack of *in personam* jurisdiction, Schoolfield's creditors responded with affidavits purporting to establish that Hickory had sufficient minimum contacts in South Carolina to subject the corporation to jurisdiction. The trial court denied Hickory's motion to quash, finding that Schoolfield's use of purchase orders identifying the corporation as a subsidiary of Hickory constituted a "special effort" to advise others that Hickory was the parent of Schoolfield and placed Hickory within the jurisdiction of South Carolina's courts.[6]

On appeal, the South Carolina Supreme Court first ruled that the creditors' affidavits should have been excluded from the trial court's consideration because they were "conclusory in nature and based almost entirely on hearsay."[7] The court then concluded that the three grounds on which Schoolfield's creditors based their claim for jurisdiction—Hickory's contract in South Carolina to purchase Schoolfield's stock, Schoolfield's public identification as Hickory's subsidiary, and the two corporations' common officers and directors[8]—were insufficient to establish jurisdiction. Finally, relying on the rule established by *Cannon Manufacturing Co. v. Cudahy Packing Co.*,[9] a United States Supreme Court decision, and its progeny,[10] the South Carolina court held that mere acquisition and control of a domestic subsidiary's capital stock does not subject the foreign parent to *in personam* jurisdiction.[11]

In *Cannon,* the plaintiff, a North Carolina corporation, brought a breach of contract action against Çudahy Packing Company, a Maine corporation that marketed products in North

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subject to the provisions of § 15-7-100(3).

5. S.C. CODE ANN. § 33-23-140(d) provides that service may be effected by delivery of a copy of the process to any foreign corporation outside the state.

6. Record at 5.

7. ___ S.C. at ___, 268 S.E.2d at 43.

8. *Id.* at ___, 268 S.E.2d at 43.

9. 267 U.S. 333 (1925).

10. In addition to *Cannon,* the court relied on Mid-Continent Tel. Corp. v. Home Tel. Co., 307 F. Supp. 1014 (N.D. Miss. 1969); Hermetic Seal Corp. v. Savoy Elecs., Inc., 290 F. Supp. 240 (S.D. Fla. 1967), *aff'd,* 401 F.2d 775 (5th Cir. 1968); Scalise v. Beech Aircraft Corp., 276 F. Supp. 58 (E.D. Pa. 1967); LaVarre v. Int'l Paper Co., 37 F.2d 141 (E.D.S.C. 1929).

11. See note 2 and accompanying text *supra.*

Carolina through its wholly owned subsidiary, Cudahy Packing Company of Alabama. Service of process was effected on the subsidiary. Justice Brandeis, writing for the Court, determined that the issue was "whether, at the time of the service of process, defendant was doing business within the State in such a manner and to such an extent as to warrant the inference that it was *present* there."[12] The Court observed: "The corporate separation, though perhaps merely formal, was real. It was not pure fiction."[13] Because of the maintenance of formal separateness, the Court affirmed dismissal for lack of jurisdiction.

Although the "*Cannon* rule" has been followed by a South Carolina district court[14] and by the Court of Appeals for the Fourth Circuit, the latter court occasionally has observed the rule with reluctance.[15] Moreover, other courts have employed a variety of methods[16] to circumvent the "*Cannon* rule" and find jurisdiction over a foreign parent of a domestic subsidiary. Where related corporations have failed to maintain the degree of formal separateness found sufficient in *Cannon* and where the parent has controlled and dominated the internal affairs of the subsidiary, some courts have allowed jurisdiction over the parent.[17] Similarly, courts have found jurisdiction where the parent

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12. 267 U.S. at 334-35 (emphasis added).

13. *Id.* at 337.

14. LaVarre v. Int'l Paper Co., 37 F.2d 141 (E.D.S.C. 1929).

15. *See, e.g.*, Harris v. Deere & Co., 223 F.2d 161, 163 (4th Cir. 1965)("The fiction of different corporate entities ought not to permit the manufacturer, in such case, to avoid suit . . . . It is not for us, however, to overrule or modify decisions of the Supreme Court . . . ."); Manville Boiler Co. v. Columbia Boiler Co., 269 F.2d 600, 606 (4th Cir. 1959)("If the rule of [*Cannon*] unduly emphasizes the form . . . and minimizes the control . . ., the rule, nevertheless, is well established. . . . As this Court observed . . ., we cannot change or modify the rule . . . .") *See also* Rollins v. Proctor & Schwartz, 476 F. Supp. 1137 (D.S.C. 1979), *rev'd on other grounds*, 634 F.2d 738 (4th Cir. 1980).

16. *See, e.g.*, Comment, *Jurisdiction Over Parent Corporations*, 51 CALIF. L. REV. 574, 580 (1963), in which the author suggests the following ways by which courts may circumvent the "*Cannon* rule": "(1) finding a failure to maintain formal intercorporate separation; (2) finding an agency relationship between parent and subsidiary; and (3) factually distinguishing *Cannon* on the relationship of the cause of action to the subsidiary and the forum." In 39 BROOKLYN L. REV. 229, 234 (1972), the author suggests three fact situations appropriate for circumvention of the rule: (1) those in which the parent-subsidiary relation is a complete sham, (2) those in which a principal-agent relationship exists, and (3) those in which the parent and subsidiary hold themselves out as a single entity. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52, Comment b (1971).

17. *E.g.*, ACS Indus., Inc. v. Keller Indus., 296 F. Supp. 1160 (D. Conn. 1969).

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has held out the subsidiary as its agent.[18] In some cases, jurisdiction has been exercised over the foreign parent even though formal separateness has been maintained, especially where the court has considered the commercial reality of the relationship.[19] Furthermore, when a dealer-distributor or a franchisor-franchisee relationship exists in which the foreign dealer or franchisor, by written agreement, dominates and controls all aspects of the business, the foreign corporation often is susceptible to service of process.[20] Nevertheless, despite criticism of the "*Cannon* rule" and attempts to circumvent it or to read it narrowly, the maintenance of formal separateness or the lack of dominant control of the subsidiary by the parent will be sufficient to bar the exercise of *in personam* jurisdiction in many instances.[21]

The value of *Cannon* has eroded considerably.[22] Many courts and commentators[23] have criticized the decision or have assigned it minimal weight. Today, the concept of presence developed in *Cannon* has been replaced by the standard, enunciated by the United States Supreme Court in *International Shoe Co. v. Washington,*[24] that the corporation must have certain "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial

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18. *E.g.,* Curtis Publishing Co. v. Cassel, 302 F.2d 132 (10th Cir. 1962).

19. *E.g.,* Boyrk v. DeHavilland Aircraft Co., 341 F.2d 666 (2d Cir. 1965).

20. *See, e.g.,* Scalise v. Beech Aircraft Corp., 276 F. Supp. 58 (E.D. Pa. 1967); Szantay v. Beech Aircraft Corp., 237 F. Supp. 58 (E.D. Pa. 1967); Szantay v. Beech Aircraft Corp., 237 F. Supp. 393 (E.D.S.C. 1965), *aff'd,* 349 F.2d 60 (4th Cir. 1965).

21. See note 10 and accompanying text *supra.* In addition, *see* McPheron v. Penn. Cent. Transp. Co., 390 F. Supp. 943 (D. Conn. 1975); American Compressed Steel Corp. v. Pettibone Mulliken Corp., 271 F. Supp. 864 (S.D. Ohio 1967).

22. *E.g.,* Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483 (D. Kan. 1978). See note 15 *supra.*

23. *E.g.,* Cardozo, *A New Footnote in Erie v. Tompkins: "Cannon Is Overruled,"* 36 N.C.L. REV. 181 (1958); Wellborn, *Subsidiary Corporations in New York: When Is Mere Ownership Enough to Establish Jurisdiction over the Parent,* 22 BUFFALO L. REV. 681, 683-85 (1973); Comment, *Jurisdiction Over Parent Corporations,* 51 CALIF. L. REV. 574 (1963); Note, *Civil Procedure—Personal Jurisdiction—Alter Ego Doctrine Employed to Support Personal Jurisdiction Over a Foreign Subsidiary Corporation Based on the Acts of the Parent Corporation in the Forum State,* 25 KAN. L. REV. 109, 118-25 (1976); Note, *Subsidiary Conduct as a Basis for Long-Arm Jurisdiction over a Parent Corporation in Vermont,* 3 VT. L. REV. 111, 118-20 (1978); 39 BROOKLYN L. REV., 229, 233-37 (1972).

24. 326 U.S. 310 (1945).

justice.' "[25] Recently, in *World-Wide Volkswagen Corp. v. Woodson*,[26] the Court focused on the defendant's contacts with the forum in terms of the amount of sales, the number of officers, the presence of an agent, and the degree of advertisement.[27]

Although the South Carolina Supreme Court has held that "this state's service of process laws and the jurisdiction of its courts [extend] to the outer limits allowable under the due process requirements of the International Shoe Company case,"[28] it nevertheless has recognized that the extension of *in personam* jurisdiction is not unlimited. In *Boney v. Trans-State Dredging Co.*,[29] the South Carolina court identified the following considerations for determining the availability of jurisdiction: "the duration of the corporate activity in the state of the forum; the character of the acts giving rise to the suit, and the circumstances of their commission; and the balancing of the inconvenience to the parties . . . ."[30] The court was careful to observe, however, that the identification of criteria "cannot be simply mechanical or quantitative,"[31] and that concern with "traditional notions of fair play and substantial justice" remains paramount.[32]

The South Carolina Supreme Court's adoption of the "*Cannon* rule" in *Yarborough* is potentially troublesome. The court noted the "minimum contacts" test for *in personam* jurisdiction, first enunciated by the United States Supreme Court in *International Shoe* and subsequently applied in South Carolina, but in holding that a foreign corporation's acquisition and control of a domestic subsidiary's capital stock does not subject the foreign parent to *in personam* jurisdiction in South Carolina, the court adopted a rule based on the outdated "corporate presence" test. The court applied the rule to find that Hickory lacked sufficient

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25. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The defendant's act must also purposefully avail the defendant of the privilege of conducting activities within the state. Hanson v. Denckla, 357 U.S. 235 (1958). Further, Shaffer v. Heitner, 433 U.S. 186, 212-13 (1977), requires that all assertions of state court jurisdiction must be evaluated according to standards established in *International Shoe* and its progeny.

26. 444 U.S. 286 (1980).

27. *Id.* at 295.

28. Triplett v. R.M. Wade & Co., 261 S.C. 419, 427-28, 200 S.E.2d 375, 379 (1973).

29. 237 S.C. 54, 115 S.E.2d 508 (1960).

30. *Id.* at 62, 115 S.E.2d at 512.

31. *Id.* (quoting *International Shoe*, 326 U.S. at 319).

32. *See id.* at 60, 115 S.E.2d at 512. See note 25 and accompanying text *supra*.

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contacts with South Carolina. While this result is reasonable on the facts before the court in *Yarborough,* it is foreseeable that the court may be confronted with an attempt to exercise jurisdiction over a foreign parent corporation having more significant contacts with the state. Should that occur, the court will be forced either to deny exercise of *in personam* jurisdiction through a blind application of the "*Cannon* rule" or to create an exception to the rule that allows recognition of significant contacts and permits the exercise of jurisdiction.

II. SUBSTITUTED SERVICE OF PROCESS

Section 33-5-60(b) of the South Carolina Code provides that whenever the registered agent of a domestic corporation cannot be found at the corporation's registered office, service of process can be effected upon the Secretary of State. The statute further provides that substituted service is not returnable in fewer than thirty days.[33] Section 15-9-20, which sets forth the requisites for summonses, requires a defendant upon whom process has been served to answer within twenty days of service.[34] In *Newberry County Water and Sewer Authority v. Welco Construction and*

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33. S.C. CODE ANN. § 33-5-60 (1976) provides:

(a) The registered agent appointed by any domestic corporation shall be the agent of such corporation for service of any process, notice, or demand required or permitted by law to be served, and such service shall be binding upon the corporation.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any person or persons designated by him to receive such service, duplicate copies of such process, notice, or demand. In the event any such process, notice, or demand is served on the Secretary of State, he shall immediately forward one of the copies thereof by registered mail, addressed to the corporation at its registered office. Any service so had on the Secretary of State shall be returnable in not less than thirty days.

(c) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(d) Nothing herein contained shall limit or impair the right to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

34. See note 39 *infra.*

Utilities Co.,[35] the South Carolina Supreme Court held that, notwithstanding section 15-9-20, section 33-5-60(b) prohibits a plaintiff from requiring responsive pleadings fewer than thirty days from the date of substituted service upon the Secretary of State. The court further ruled that when substituted service has been effected a summons requiring a response in fewer than thirty days is fatally and jurisdictionally defective.[36]

Newberry County Water and Sewer Authority commenced suit against Welco Construction and Utilities Company by substituted service upon the Secretary of State because Welco's local office was closed and the corporation had gone out of business.[37] Plaintiff also sent a courtesy copy of the pleadings to Welco's counsel.[38] The summons complied with the statutory pleading provisions of the South Carolina Code[39] and required an answer within twenty days.[40] Welco appeared specially to challenge jurisdiction,[41] and the trial court dismissed the proceeding on the ground that the summons was jurisdictionally de-

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35. ___ S.C. ___, 266 S.E.2d 875 (1980).

36. *Id.* at ___, 266 S.E.2d at 876.

37. *Id.* at ___, 266 S.E.2d at 875-76.

38. *Id.* Before this action, the same controversy was pending in the United States District Court as a diversity action in which United States Fidelity and Guaranty Company was the plaintiff with Newberry Water and Welco as defendants. On the motion of Newberry Water, the district court realigned the parties and dismissed the action because diversity was destroyed. The present action was initiated on December 15, 1978. After substituted service the same day, one copy of the summons and complaint was mailed by the Secretary of State and returned by the post office marked "moved not forwardable." On December 18, 1978, counsel for Welco was given a courtesy copy.

Welco, never having received service, did not answer. On January 29, 1979, counsel for Welco contacted counsel for Newberry Water to determine why Welco had not been served. Counsel for Newberry Water replied that Welco had been served through the Secretary of State and was in default. Upon considering whether to allow Welco to answer or to stand on alleged default, plaintiff's attorney advised Welco that it would not be allowed to answer. On the same day, Welco made a special appearance challenging jurisdiction. Record at 1-3.

39. S.C. CODE ANN. § 15-9-20 (1976) provides:

> The summons shall be subscribed by the plaintiff or his attorney and directed to the defendant. It shall require the defendant to answer the complaint and serve a copy of his answer on the person whose name is subscribed to the summons at a place within the State, to be therein specified, in which there is a post office, within twenty days after the service of the summons, exclusive of the day of service.

40. Record at 4.

41. A general appearance would have constituted waiver of any defect or irregularity in service of process. *E.g.*, Strickland v. Consolidated Energy Prods. Co., ___ S.C. ___, 265 S.E.2d 682 (1980); Connell v. Connell, 249 S.C. 162, 153 S.E.2d 396 (1967).

fective because it required the defendant to respond in less time than prescribed by statute.[42]

On appeal, the South Carolina Supreme Court upheld the trial court's ruling that a summons served by substituted service and requiring a response in fewer than thirty days is jurisdictionally defective.[43] It rejected Newberry County Water and Sewer Authority's argument that the phrase "returnable in not less than thirty days" referred to return of proof of service[44] and concluded that the statute purposely did not require a response in fewer than thirty days in order to allow additional time to a corporate defendant upon whom substituted service has been effected.[45]

An examination of decisions in other jurisdictions reveals a split of authority on the issue of fatal defect.[46] Many courts have decided that a summons requiring an earlier return than that prescribed by statute is jurisdictionally defective.[47] Other courts, however, have held that such a summons is merely irregular and

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42. Record at 36.

43. The court's review of prior case law indicated that in similar situations other summonses had been found jurisdictionally defective. For example, magistrates' summonses requiring an appearance in less time than that prescribed by statute had been found inadequate to confer personal jurisdiction. Paul v. Southern Ry. Co., 50 S.C. 23, 27 S.E. 526 (1897); Adkins v. Moore, 43 S.C. 173, 20 S.E. 985 (1895); *see* S.C. CODE ANN. § 22-3-120 (1976). Also, an order to show cause has been found fatally defective because it required a defendant to answer in less than the twenty-day statutory period. State *ex rel.* Lindsey v. Tollison, 95 S.C. 58, 78 S.E. 521 (1913).

Chief Justice Lewis, in his dissent, disagreed with the majority's reasoning, taking the position that the substituted service provision increased the time for answering to thirty days but did not require an express statement in the summons to that effect in order for it to be jurisdictionally sufficient. ___ S.C. at ___, 266 S.E.2d at 877 (Lewis, C.J., dissenting).

44. While the phrase was not discussed directly, the Reporter's Notes indicate that the "net effect [of § 33-5-60(b)] is to increase the number of persons upon whom process may be served, and thus almost wholly eliminate a corporation's evading service of process." JOINT COMM. OF THE GEN. ASSEMBLY TO INVESTIGATE THE FEASIBILITY OF REVISING THE LAWS RELATING TO CORPS. & SECS., DRAFT VERSION: SOUTH CAROLINA BUSINESS CORPORATION ACT OF 1962, at 25 (1961).

45. ___ S.C. at ___, 266 S.E.2d at 876.

46. *See* Annot., 97 A.L.R. 746, 748-49 (1935); Annot., 6 A.L.R. 841, 843-45 (1920).

47. *E.g.*, Greene v. Municipal Court, 51 Cal. App. 3d 446, 124 Cal. Rptr. 139 (1975); Schoffel v. Goodstein, 107 Misc. 695, 177 N.Y.S. 844 (Bronx County Ct. 1919); Tucci v. Romeo, 94 Misc. 317, 158 N.Y.S. 262 (App. Term 1916); Aggers v. Bridges, 31 Okla. 617, 122 P. 170 (1912); Nicodemus v. Farley, 16 Pa. D. & C. 547 (1931); Martin v. Nelson, 533 P.2d 897 (Utah 1975); Emery v. Emery, 404 P.2d 745 (Wyo. 1965); National Supply Co. v. Chittim, 387 P.2d 1010 (Wyo. 1964); Vanover v. Vanover, 77 Wyo. 55, 307 P.2d 117 (1957).

amendable[48] or that the error is not fatal where the defendant was not deceived or misled to his detriment or prejudice.[49]

Newberry provided an excellent opportunity for the South Carolina Supreme Court to interpret section 33-5-60, the substituted service provision, and to resolve any conflict between it and section 15-9-20[50] without causing any apparent harm to the parties.[51] Nevertheless, application of this decision in some instances may produce harsh results. Plaintiffs intending to serve by substituted service pursuant to section 33-5-60 are now on notice to set a time for response in excess of thirty days.

III. VENUE

A. *Owning Property and Transacting Business*

In South Carolina, venue for actions in which a corporation is one of several defendants may be determined pursuant to either of two statutes. Section 15-7-30 of the South Carolina Code provides that an action with multiple defendants will be tried in the county where one of the defendants resides.[52] Section 15-9-

48. *E.g.*, Lockway v. Modern Woodmen of America, 116 Minn. 115, 133 N.W. 398 (1911); Barker Co. v. Central West Inv. Co., 75 Neb. 43, 105 N.W. 985 (1905); Elder v. Morse, 214 A.D. 632, 212 N.Y.S. 581 (1925).

49. *E.g.*, Widmer v. Wood, 244 Ark. 307, 425 S.W.2d 514 (1965); United Order of Good Samaritans v. Brooks, 168 Ark. 570, 270 S.W. 955 (1925); Krueger v. Lynch, 242 Iowa 772, 48 N.W.2d 266 (1951); Continental Ins. Co. v. Norman, 71 Okla. 146, 176 P. 211 (1918).

50. See note 39 *supra*.

51. In finding the summons jurisdictionally defective in this case, the court prevented a default when the defendants had never been served, even though the plaintiff most likely was aware of their present address. During the course of the federal court action, counsel for the appellant on two separate occasions took the deposition of the officers and sole stockholders in the respondent corporation. One of the officers also was the registered agent for service of process. Record at 1. During the course of these depositions, the appellant learned that Welco no longer was doing business in Sumter, South Carolina, and that these two men presently were living in Florence, South Carolina. Brief of Respondent at 1; Record at 18-19, 25-26, 29.

52. S.C. CODE ANN. § 15-7-30 (1976) provides:

> In all other cases the action shall be tried in the county in which the defendant resides at the time of the commencement of the action. If there be more than one defendant then the action may be tried in any county in which one or more of the defendants to such action resides at the time of the commencement of the action. If none of the parties shall reside in the State the action may be tried in any county which the plaintiff shall designate in his complaint. This section is subject however to the power of the court to change the place of trial in certain cases as provided by law.

210 places venue in an action to which a corporation is a party in any county where the corporation owns property and transacts business.[53] In *In re Asbestosis Cases*,[54] the South Carolina Supreme Court construed the two venue statutes together and held that residence, for purposes of venue, includes those counties in which any corporate defendant owns property and transacts business[55] at the time the suit is commenced.[56] The court further held that a corporate defendant's substantial contract rights in a forum constitute the requisite property ownership.[57]

In re Asbestosis Cases resulted from the pretrial consolidation of a number of products liability suits. With the exception of defendant Covil Corporation, whose only place of business was Greenville, South Carolina,[58] all defendants were foreign corporations. Suit was commenced in Barnwell County, and Covil moved for a change of venue to Greenville, but its motion was denied.[59] On appeal, Covil argued that section 15-7-30 was "exclusively applicable in all cases involving multiple defendants" and that venue, therefore, should be limited to those counties where the domestic corporation maintained its principal place of business, an office, or an agent for the transaction of business.[60] The South Carolina Supreme Court rejected this argument and affirmed the right of foreign corporate defendants, pursuant to section 15-9-210, to venue in a forum where they transacted business and owned property. The court then con-

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53. S.C. CODE ANN. § 15-9-210 (1976) provides:

> If the suit be against a corporation, the summons shall, except as otherwise expressly provided, be served by delivering a copy thereof to the president or other head of the corporation, or to the secretary, cashier or treasurer or any director or agent thereof; *provided, further*, that, in the case of domestic or foreign corporations, service as effected under the terms of this section shall be effective and confer jurisdiction over any domestic or foreign corporation in any county where such domestic or foreign corporation shall own property and transact business, regardless of whether or not such domestic or foreign corporation maintains an office or has agents in that county.

54. ___ S.C. ___, 266 S.E.2d 773 (1980).

55. *Id.* at ___, 266 S.E.2d at 775.

56. *Id.* at ___, 266 S.E.2d at 776 (citing Lott v. Claussens, Inc., 251 S.C. 478, 163 S.E.2d 615 (1968) and Burris Chem., Inc. v. Daniel Constr. Co., 251 S.C. 483, 163 S.E.2d 618 (1968)).

57. *Id.* at ___, 266 S.E.2d at 777.

58. *Id.* at ___, 266 S.E.2d at 777.

59. *Id.* at ___, 266 S.E.2d at 777.

60. *Id.* at ___, 266 S.E.2d at 775.

cluded that the two statutes, sections 15-7-30 and 15-9-210, should be construed together and that the residence provision of section 15-7-30 includes, for purposes of determining venue, those counties in which any corporate defendant owned property and transacted business, as provided in section 15-9-210.[61] As a result of this conclusion, venue in an action with multiple corporate defendants is proper in any forum in which one of them owns property and transacts business.[62]

The court next determined that a corporate defendant must satisfy the test for property ownership at the time the suit is commenced rather than at the time the cause of action accrues.[63] Because Covil did not own property or transact business in Barnwell County at the time the action was commenced, plaintiffs alleged that the activities of North Brothers, Inc., a foreign corporate defendant, were sufficient to confer venue in Barnwell County.[64] Although no evidence showed that North Brothers owned tangible personal property in Barnwell County, plaintiffs urged that the corporation owned intangible property in the form of contract rights resulting from an agreement with the DuPont Savannah River Plant in Barnwell County,[65] and, in so doing, presented the court with the question of whether the alleged contract rights constituted a sufficient basis for venue in Barnwell County.

While the court had recognized in previous decisions that contract rights can be considered property rights for determining questions of venue,[66] it had not established a minimum standard of sufficiency against which contracts might be measured. The court has ruled, however, that, to constitute "transacting business" for purposes of venue, a corporation must have conducted continuous business, amounting to more than "mere casual, occasional, or isolated transactions."[67] From these earlier

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61. *Id.* at ___, 266 S.E.2d at 775.

62. In cases with multiple defendants, venue is proper in any county in which at least one defendant resides. S.C. CODE ANN. § 15-7-30 (1976).

63. ___S.C. at ___, 266 S.E.2d at 775.

64. *Id.* at ___, 266 S.E.2d at 776.

65. *Id.* at ___, 266 S.E.2d at 776.

66. *See* Peeples v. Orkin Exterminating Co., 244 S.C. 173, 135 S.E.2d 845 (1964) (termite inspection contracts); Gibbes v. National Hosp. Serv., Inc., 202 S.C. 304, 24 S.E.2d 513 (1943)(insurance contracts).

67. Atkinson v. Korn Indus., Inc., 219 S.C. 402, 406, 65 S.E.2d 465, 466 (1951).

determinations, the court in *In re Asbestosis Cases* concluded that "the property owned in a given county necessary to hold venue proper in that county should be substantial in nature, especially where the property is intangible."[68] Therefore, a contract upon which venue can be predicated must be substantial in nature.

Having established the requirement that a contract used as a basis for venue must be substantial in nature and having indicated that such considerations as the size and duration of the contract and the nature of the work performed are relevant in determining the materiality of a contract, the court, in *In re Asbestosis Cases,* was unable to apply the standard because the contract between North Brothers and DuPont had not been made part of the record.[69] Consequently, the decision offers no insight into the amount of money with which a contract must be concerned or the duration or type of contract that is necessary. Furthermore, an examination of prior decisions fails to reveal a consistent approach to the determination of whether contract rights constitute property ownership.[70] Therefore, while the

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68. ___S.C. at ___, 266 S.E.2d at 777.

69. *Id.* at ___, 266 S.E.2d at 777-78.

70. In earlier cases, the court focused on the transitory nature of the property; more recently it has examined the relation between the property and the necessity of the business. Moreover, in some cases the court has looked to the contracts involved but in other cases has failed to mention them.

In *Gibbes,* for example, the court ruled that venue was proper in Aiken County because the defendant insurance company had insurance policies there that constituted valuable property rights. Later, in *Peeples,* the court held that renewable contracts for the extermination of termites and for inspection and repair were property within the venue statute. See note 66 and accompanying text *supra.* Stressing the continuous nature of the duties and obligations, the court in *Gibbes* and *Peeples* distinguished these decisions from Brown v. Palmetto Baking Co., 220 S.C. 38, 66 S.E.2d 417 (1951), and Hopkins v. Sun Crest Bottling Co., 228 S.C. 287, 89 S.E.2d 755 (1955), in which the physical property was only temporarily in the county. In neither *Brown* nor *Hopkins* did the court mention any contractual agreement. In Lott v. Claussens, Inc., 251 S.C. 478, 163 S.E.2d 615 (1968), the court relied on *Gibbes* and *Peeples* and found venue proper in Barnwell County because, as a dues paying member of the South Carolina Bakers' Council, Claussens had acquired a valuable and legally enforceable right to use bread display racks and counters in stores in Barnwell County. The court noted that this right was continuous and permanent in nature. Finally, in the recent decision of Mathis v. A.R. Wood Corp., 272 S.C. 388, 252 S.E.2d 131 (1979), the defendant corporation had contracts valued at approximately $190,000 to install water lines and a raw water pump station. The property in question consisted of several pieces of equipment used on the job. The court rejected the defendant's argument that venue was improper because the equipment was transitory in nature and only temporarily in the county, stressing that

court has set forth a standard against which contracts can be measured for purposes of determining venue, the manner in which the standard will be applied remains to be resolved.

B. Waiver of Right to Change Venue

In *Landvest Associates v. Owens*[71] and *Henley v. North Trident Regional Hospital*,[72] the Supreme Court of South Carolina ruled that the actions of the defendants constituted waiver of the right to demand change of venue to the county of defendant's residence.

1. Landvest Associates v. Owens.—Landvest Associates and Landvest II filed separate actions in Charleston County against Owens. Plaintiffs alleged fraud and deceit under the Limited Partnership Act[73] and sought an accounting. Owens, a resident of Beaufort County at the time the actions were commenced, "answered, counterclaimed, participated in extensive discovery proceedings, successfully opposed plaintiffs' motions for summary judgment, and moved that plaintiffs be required to elect between their causes of action."[74] Thereafter, Owens moved for a change of venue to the county of his residence pursuant to section 15-7-30 of the South Carolina Code.[75] The lower court denied the motion on the ground that defendant had waived his right to change venue.

On appeal, the supreme court affirmed the lower court's or-

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the mere fact that property is personal and movable is not controlling. Additionally, the court found that the length of time the property is in a county is not significant; rather, it ruled that it is necessary to examine the relationship between the property and the necessities of business. In *Mathis*, because the equipment was necessary for the transaction of defendant's business in Newberry County and, inferentially, was to be maintained there as long as the defendant engaged in business in the county, the defendant's ownership of the equipment met the statutory requirements to support venue in Newberry County.

71. 274 S.C. 334, 263 S.E.2d 646 (1980).

72. ___ S.C. ___, 269 S.E.2d 328 (1980).

73. S.C. CODE ANN. § 33-43-110(1)(b). This section provides that a limited partner has the right to "have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable . . . ."

74. 274 S.C. at 335, 263 S.E.2d at 647.

75. S.C. CODE ANN. § 15-7-30 (1976). This section provides that "the action shall be tried in the county in which the defendant resides at the time of the commencement of the action."

der,[76] reiterating that, while the right to be tried in the county of one's residence is a subtantial and valuable right, it relates only to the question of venue and can be waived.[77] Although certain procedural activities do not constitute waiver,[78] the court refused to place Owens' actions within the protected area.[79] Focusing particularly on the successful defense to the motions for summary judgment, the court stressed that, had Owens not been successful, summary judgment against him would have precluded his seeking a change of venue.[80] Therefore, Owens' motion for change of venue "came too late."[81]

2. Henley v. North Trident Regional Hospital.—Henley filed a medical malpractice action in Dorchester County against the North Trident Regional Hospital. Five months later, after answering the complaint and serving interrogatories on Henley, the Hospital moved for a change of venue on the ground that it was a resident of Charleston County.[82] The lower court denied the motion, finding that the Hospital had waived any right it might have had to demand a trial in Charleston County.[83]

On appeal, the supreme court affirmed and held that, although the simultaneous filing of an answer and interrogatories alone might not be sufficient to establish waiver, the additional element of failure to claim the right within a reasonable time barred the Hospital's right to change of venue.[84] The court's determination that the Hospital had failed to make its claim

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76. 274 S.C. at 335, 263 S.E.2d at 647.

77. *Id. Accord,* Triangle Auto Spring Co. v. Gromlovitz, 270 S.C. 386, 242 S.E.2d 430 (1978).

78. The filing of an answer does not constitute waiver. Witherspoon v. Spotts & Co., 227 S.C. 209, 87 S.E.2d 477 (1955); Brown v. Palmetto Baking Co., 220 S.C. 38, 66 S.E.2d 417 (1951). The filing of a counterclaim along with the answer, in which the defendant expressly reserves the right to move for change of venue, does not constitute waiver. Harmon v. Graham, 247 S.C. 54, 145 S.E.2d 521 (1965).

79. 274 S.C. at 336, 263 S.E.2d at 648.

80. *See* Rosamond v. Lucas-Kidd Motor Co., 182 S.C. 331, 189 S.E. 641 (1937); Lillard v. Searson, 170 S.C. 304, 170 S.E. 449 (1933).

81. 274 S.C. at 336, 263 S.E.2d at 648.

82. ___ S.C. at ___, 269 S.E.2d at 328. The order of the lower court did not address the issue of whether the Hospital was a resident of Dorchester County. The supreme court stated that, for the purposes of the appeal, the location of the Hospital was unimportant because the Hospital had waived its right to change venue. *Id.* at ___ n.1, 269 S.E.2d at 328 n.1.

83. *Id.* at ___, 269 S.E.2d at 328.

84. *Id.* at ___, 269 S.E.2d at 329.

within a reasonable time was based upon three considerations: the Hospital had been granted an extension of time to answer; its answer did not reserve the right to move for a change of venue; and its motion for a change of venue was made five months after service of the complaint and three months after the Hospital's answer.[85] Although the lower court had not emphasized the time element, the supreme court called attention to "the inevitable delay brought about by failure of the hospital to move promptly,"[86] and refused to disturb the lower court's ruling.[87]

3. Conclusion.—Although a defendant does not waive the right to request a change of venue merely by filing an answer,[88] a motion to change venue must be filed early in the action. Failure to do so constitutes tacit agreement to the forum chosen by the plaintiff. *Landvest* and *Henley* make it clear that, to avoid waiver, the motion must be made before a defendant takes substantial procedural steps.

IV. DOOR-CLOSING STATUTE

Section 15-5-150 of the South Carolina Code opens South Carolina's state courts to suits against foreign corporations only if they are brought by a South Carolina resident or by a nonresident for a cause of action that arises within the state.[89] In *Proctor & Schwartz, Inc. v. Rollins*,[90] the Fourth Circuit Court of Appeals held that this door-closing statute prevents a nonresident plaintiff from bringing an action in federal court in South

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85. *Id.* at ___, 269 S.E.2d at 329.

86. *Id.* at ___, 269 S.E.2d at 329.

87. The supreme court can affirm on any ground appearing in the record. S.C. SUP. CT. R. 4, § 8.

88. See note 78 *supra*.

89. S.C. CODE ANN. § 15-5-150 (1976) provides:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court.
>
> (1) By any resident of this State for any cause of action; or
>
> (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

The South Carolina Supreme Court has ruled that the door-closing statute closes the door of South Carolina's state courts to foreign causes of action brought by a nonresident defendant against a foreign corporation. Nix v. Mercury Motor Express, Inc., 270 S.C. 477, 242 S.E.2d 683 (1978).

90. 634 F.2d 738 (4th Cir. 1980).

Carolina against a foreign corporation when the state's statute of limitations is the only reason for the choice of forum.[91]

Plaintiff in *Rollins* was a Georgia resident who had been injured in a textile machinery accident in Georgia. Proctor & Schwartz, a Pennsylvania corporation and wholly owned subsidiary of SCM, a New York corporation, manufactured the allegedly defective machine. Plaintiff first recovered workmen's compensation under Georgia law and then brought a personal injury action against Proctor & Schwartz and SCM in the United States District Court for the District of South Carolina.[92] Plaintiff filed the suit within South Carolina's six-year statute of limitations[93] but after Georgia's two-year limitation period[94] had run.[95] The district court decided, *inter alia,* that the door-closing statute did not bar the action[96] and denied defendants' motion to dismiss[97] but ruled that defendants had the right to immediate appeal of the decision.[98] The Court of Appeals for the Fourth Circuit reversed and held that South Carolina's door-closing statute deprived the district court of subject matter jurisdiction.[99]

The Fourth Circuit Court of Appeals previously had addressed the question of whether the door-closing statute restricted the jurisidction of the federal courts in South Carolina in diversity cases in *Szantay v. Beech Aircraft Corp.*[100] There the court noted that "[f]or many years it was generally under-

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91. *Id.* at 740.

92. *Id.* at 739.

93. S.C. CODE ANN. § 15-3-530(5)(Supp. 1980).

94. GA. CODE ANN. § 3-1004 (1975).

95. 634 F.2d at 739.

96. Rollins v. Proctor & Schwartz, 478 F. Supp. 1137, 1152 (D.S.C. 1979).

97. Defendants' grounds for dismissal included lack of *in personam* jurisdiction, improper venue, lack of subject matter jurisdiction, and Georgia's two-year statute of limitations. Memorandum in Support of Defendants' Motion to Dismiss at 2, Rollins v. Proctor & Schwartz, 478 F. Supp. 1137 (D.S.C. 1979).

98. *See* 28 U.S.C. § 1292(b) (1976).

99. 634 F.2d at 740.

100. 349 F.2d 60 (4th Cir. 1965). In *Szantay,* plaintiff's decedent purchased a Beech aircraft in Nebraska and flew it to Florida. On the way to Chicago by way of Columbia, South Carolina, plaintiff's decedent and his passengers were killed in a crash in Tennessee. Companion wrongful death actions were brought by representatives of the victims, all citizens of Illinois, against Beech and Dixie Aviation Company, which had serviced the plane in Columbia. Beech was a Delaware corporation with its principal place of business in Kansas. Dixie was a South Carolina corporation.

stood that federal jurisdiction was not affected by state statutes limiting the jurisdiction of their own courts"[101] but that *Erie R. Co. v. Tompkins*[102] and its progeny[103] had modified that absolute approach.[104] The court concluded that, under the *Erie* doctrine, a federal court exercising diversity jurisdiction in South Carolina must apply section 15-5-150 "absent affirmative countervailing federal considerations."[105] The court identified three such considerations: the goal of avoiding discrimination against nonresidents in diversity actions, the goal of encouraging enforcement of the laws of sister states, and the policy of providing efficient joinder in multiparty actions.[106] Because the court viewed these considerations as explicit and substantial and considered the state's reasons for enacting the door-closing statute to be "uncertain," it refused to apply the statute.[107]

Relying on the rationale of *Szantay,* the district court in *Rollins* concluded that affirmative countervailing federal consid-

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101. 349 F.2d at 63.

102. 304 U.S. 64 (1938).

103. In *Erie,* the Supreme Court decided that, except in matters governed by the United States Constitution or Acts of Congress, federal courts sitting in diversity must apply state substantive law, decisional as well as statutory, in the adjudication of state-created rights. Construing *Erie* in Guaranty Trust v. York, 326 U.S. 99 (1945), the Court noted that, in cases in which a federal court exercises diversity jurisdiction, the outcome of the litigation in the federal court "should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id.* at 109. The "outcome determinative" test was refined in Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525 (1958). In *Byrd,* the Court decided that a state procedural rule must be applied by a federal court where it was bound up with the state-created rights and obligations; however, if the rule were a mere form or mode of enforcing rights, its application hinged on a broader inquiry. The federal court was required to conform to the state rules, in the absence of other considerations, when they substantially affected the outcome of the litigation. *Id.* at 536. Later, in Hanna v. Plumer, 380 U.S. 460 (1965), the Court noted that the "outcome determinative" test had to be read with reference to the "twin aims" of *Erie:* "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468.

104. 349 F.2d at 63.

105. *Id.* at 64.

106. *Id.* at 65-66.

107. *Id.* The court, noting the lack of legislative history underlying the statute, surmised that the statute might have been a formulation of the doctrine of *forum non conveniens* or an attempt to relieve docket congestion. The court labeled as "attenuated" the suggestion that the statute was designed to encourage foreign corporations to do business in the state. The court concluded that the state's reason for enacting the statute was "uncertain." *Id.* For a historical development of the prototype for § 15-5-150, Ch. 438, § 427, 1849, N.Y. LAWS 697, see Lowenfield, *Litigating a Sovereign Immunity Claim—The Haita Case,* 49 N.Y.U.L. REV. 377, 401-05 (1974).

erations were present, particularly the goal of avoiding discrimination against foreign parties in a diversity action, and ruled that because the plaintiff could have brought suit had he moved to South Carolina, "an accident of residence" should not operate to his detriment.[108] The Fourth Circuit, however, found this rationale unpersuasive and concluded that *Rollins* was analogous not to *Szantay* but to *Bumgarder v. Keene Corp.*,[109] an action in federal court in South Carolina against a foreign corporation brought by a North Carolina plaintiff on injuries sustained in that state. In *Bumgarder,* the federal court of appeals refused to apply the reasoning of *Szantay* because "there was an alternate forum to the South Carolina court where Bumgarder could gain full relief" and held that the action was prohibited by the state's door-closing statute.[110] As in *Rollins,* the plaintiff in *Bumgarder* had commenced his action in South Carolina after the statute of limitations in his home state had run.[111] Relying on *Bumgarder,* the Fourth Circuit Court of Appeals in *Rollins* determined that failure "to timely file suit in the more logical, convenient forum does not constitute a countervailing consideration favoring the exercise of federal jurisdiction."[112] Consequently, because no countervailing federal considerations were recognized, the court of appeals held that the door-closing statute deprived the federal district court of jurisdiction.[113]

In *Rollins,* the court of appeals confirmed its position that section 15-5-150 prevents a nonresident plaintiff from bringing a foreign action in South Carolina merely to take advantage of the six-year statute of limitations. Where there is, or has been, an alternate forum in which the plaintiff could logically and conveniently gain full relief, South Carolina's door-closing statute will prevent the action from being brought in federal or state courts in South Carolina.

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108. *See* 478 F. Supp. at 1151.

109. 593 F.2d 572 (4th Cir. 1979).

110. *Id.* at 572.

111. 634 F.2d at 740 n.2. North Carolina's statute of limitations is codified in N.C. GEN. STAT. § 1-52(5)(Supp. 1979).

112. 634 F.2d at 740.

113. *Id.*

V. DEFAULT JUDGMENT

Although failure by a defendant to respond to a complaint in a proper and timely manner may result in a default judgment,[114] South Carolina courts have discretion to grant relief from default judgments pursuant to section 15-27-130 of the South Carolina Code.[115] In *Stewart v. Floyd*,[116] the South Carolina Supreme Court refused to recognize defendant's failure to respond to a second complaint as excusable neglect even though the original complaint had been dismissed by an *ex parte* order.[117]

In *Stewart*, plaintiff brought a malpractice action in Richland County Court against a practicing physician who, upon receipt of the summons and complaint, forwarded copies to his attorney and his malpractice insurer. Plaintiff's attorney, upon

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114. S.C. CODE ANN. § 15-35-310 (1976) provides that:

Judgment may be had, if the defendant fail to answer the complaint, as follows: In any action on contract the plaintiff may file proof of lawful service of summons and complaint on one or more of the defendants or of the summons, according to the provisions of § 15-13-230, and that no appearance, answer or demurrer has been served on him. The clerk shall place all such cases on the default calendar, and such calendar shall be called the first day of the term. When the action is on a complaint for the recovery of money only judgment may be given for the plaintiff by default (a)(i) if the demand be liquidated or (ii) if unliquidated and the plaintiff itemize his account, append thereto an affidavit that it is true and correct and no part of the sum sued for has been paid by discount or otherwise and a copy be served with the summons and complaint on the defendant or (b) if the plaintiff prove his claim in open court, whether itemized or not, in which case the judgment shall be for the sum sued for as in the case of liquidated demands. In case notice for appearance in an action has been given by or on behalf of a defendant but no answer or demurrer has been, or thereafter shall be, served within the time required by law the plaintiff upon filing proof of such facts shall have his judgment by default against such defendant in the same manner and with like effect as in cases where no notice of appearance has been given. In all other cases the relief to be afforded the plaintiff shall be ascertained either by the verdict of a jury or in cases in chancery by the judge, with or without a reference, as he may deem proper.

The order for judgment in such cases shall be endorsed upon or attached to the complaint.

115. S.C. CODE ANN. § 15-27-130 (1976) provides *inter alia* as follows:
The court may, in its discretion and upon such terms as may be just, at any time within one year after notice thereof relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding.

116. ___ S.C. ___, 265 S.E.2d 254 (1980).

117. *Id.* at ___, 265 S.E.2d at 256.

discovering that the damages prayed for far exceeded the county court's jurisdictional limit, requested opposing counsel's consent to alteration of the erroneous caption and to filing in the proper court. Defendant's counsel denied this request, and plaintiff's attorney obtained an *ex parte* order dismissing the action. A copy of the order was sent to defendant's malpractice insurer. Plaintiff then served[118] defendant with a second summons and complaint that were identical to the previous pleadings except for the part of the caption designating the forum. Defendant failed to notify his attorneys of the second service, and, consequently, made no appearance, answer, or other pleading within the statutory period. Plaintiff filed an affidavit of default,[119] and the court, sitting without jury, rendered a judgment in his favor for actual and punitive damages totaling $100,000.[120]

Defendant first moved to vacate the default judgment on the ground of lack of service. When the trial court denied that motion, plaintiff next moved to vacate on the ground of excusable neglect, inadvertence, or surprise, pursuant to section 15-27-130. Following denial of his second motion, defendant appealed to the supreme court,[121] and there argued that, because the two pleadings were very similar, he mistakenly had believed that forwarding the first to his attorney was sufficient.[122] The court gave three reasons for rejecting this argument. First, defendant's testimony concerning his alleged reaction upon service of the second set of papers was "diminished" by his continued assertion that he had no personal recollection of the second service.[123] Second, the court consistently has refused to recognize a defendant's failure to appreciate the importance of pleadings as excusable neglect.[124] Finally, the court concluded that defendant

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118. Defendant denied that this service was made; however, the issue was resolved in a prior action before the lower court. *Id.* at ___ n.2, 265 S.E.2d at 255 n.2.

119. See note 114 *supra*.

120. ___ S.C. at ___, 265 S.E.2d at 255.

121. No appeal was taken from the denial of the motion based on lack of service. ___ S.C. at___, 265 S.E.2d at 255.

122. *Id.* at ___, 265 S.E.2d at 255.

123. *Id.* at ___, 265 S.E.2d at 255.

124. DeNault v. Holloway Builders, Inc., 271 S.C. 468, 248 S.E.2d 265 (1978) (no excusable neglect where defendant failed to attend to a summons and complaint because he was served with two complaints within the same week and was confused with regard to the respective dates of service); Thermal Insulation Co. v. Town & Campus, Inc., 271 S.C. 478, 248 S.E.2d 310 (1978)(no excusable neglect where two similar suits were served

was not prejudiced by dismissal of the first suit by *ex parte* order, and, therefore, that the *ex parte* order was not the proximate cause of his failure to give attention to the second set of pleadings.[125]

On previous occasions, the supreme court has ruled that trial courts have discretion to grant relief from a default judgment when the defendant successfully establishes both excusable neglect and a meritorious defense to the action.[126] The lower court, in granting relief, must make specific findings of fact,[127] and its determination will not be disturbed absent clear abuse of discretion.[128] Furthermore, the supreme court apparently requires that the act causing the delay be beyond the control of the defaulting party or his attorney or that it be attributable to the actions of opposing party or counsel.[129]

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on the defendants and only one was delivered to the attorney for attention); McInerny v. Toler, 260 S.C. 382, 196 S.E.2d 122 (1973)(no excusable neglect where, after reading the complaint, the defendant thought that the plaintiff erroneously and inadvertently brought the action against him since he assumed that he had no interest in the lease in question because of his assignment of his interest to his children). The court in *Stewart* noted that in these earlier cases there was no evidence of any expectation that the lawsuits against the defendants would be served. In *Stewart,* however, both appellant's personal attorney and the attorney for the malpractice insurer were aware that a second action might be forthcoming. Counsel for the malpractice insurer testified that he called Dr. Floyd's attorney both after Stewart's attorney requested an amendment to the original suit and after he had received a copy of the order of dismissal of the county court suit. On each occasion, he advised appellant's attorney that they might well expect suit to be brought subsequently in the court of common pleas. ___ S.C. at ___ n.3, 265 S.E.2d at 256 n.3.

125. ___ S.C. at ___, 265 S.E.2d at 256. Justice Littlejohn, joined by Justice Gregory, noted in his dissent that defendant's failure to respond to the second complaint resulted from error by plaintiff's counsel in designating the wrong court on the first complaint. In addition, he suggested that the *ex parte* order, sought without notice to the interested parties, had been procured improperly. *Id.* at ___, 265 S.E.2d at 257. Finally, Justice Littlejohn asserted that plaintiff was permitted to benefit from his error in bringing the original action in a court without jurisdiction. *Id.* at ___, 265 S.E.2d at 257.

126. *E.g.,* McInerny v. Toler, 260 S.C. 382, 196 S.E.2d 122 (1973). The standard is the same for granting relief from default before judgment. Commercial Credit Corp. v. Knight, 272 S.C. 203, 248 S.E.2d 589 (1978)(applying § 15-13-90).

127. *E.g.,* Integon Life Ins. Corp. v. Business Futures Planning Corp., ___ S.C. ___, 266 S.E.2d 81 (1980).

128. *E.g.,* Thermal Insulation Co. v. Town & Campus, Inc., 271 S.C. 478, 248 S.E.2d 310 (1978)(applying § 15-27-130); Simon v. Flowers, 231 S.C. 545, 99 S.E.2d 391 (1957)(applying § 15-13-90).

129. In Tolpa v. Bill Jones Realty, ___ S.C. ___, 270 S.E.2d 622 (1980), the court affirmed a finding of excusable neglect and set aside a default judgment when respondents were unable to serve responsive pleadings within the statutory period because of the mandatory evacuation of Hilton Head Island during a hurricane. In Strickland v.

Except in isolated instances, the South Carolina Supreme Court has been reluctant to find excusable neglect. The policy behind this approach is clear: a party's delay wastes time and money and hinders the promotion of swift, efficient adjudications. Nevertheless, the court also has held that section 15-27-130 should be construed liberally to see that justice is promoted and cases are disposed of on their merits.[130] Justice can best be attained when the need for efficiency and economy is balanced with efforts to dispose of cases on their merits.

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Consol. Energy Prods. Co., ___ S.C. ___, 265 S.E.2d 682 (1980), the court reversed a denial of a motion for extension of time to answer when the delay of respondent's counsel in acting on a request for an extension was sufficient to mislead appellants' counsel. The court noted that it was clear that appellants' counsel had endeavored diligently and in good faith to serve his client and that, when the request for extension was communicated, respondent's counsel should have been aware of the importance of a prompt reply. *Id.* at ___, 265 S.E.2d at 684. The court has been particularly willing to find excusable neglect when possible confusion has resulted from service of a summons without a complaint. S.C. CODE ANN. § 15-13-230 (1976) provides:

> A copy of the complaint need not be served with the summons, except when service is made upon a motor vehicle carrier under the provisions of § 15-9-340 or upon a nonresident director of a domestic corporation under the provisions of § 15-9-430. But if a copy of the complaint be not so served the summons must state where the complaint is or will be filed, and if the defendant, within twenty days thereafter, causes notice of appearance to be given and, in person or by attorney, demands in writing a copy of the complaint, specifying the place within the State where it may be served, a copy thereof must within twenty days thereafter be served accordingly. Only one copy of the complaint need be served on the same attorney.

The court generally has found this procedure so irregular or confusing that it gives rise to excusable neglect. *See* Williams v. Carpenter, 273 S.C. 339, 256 S.E.2d 316 (1979); Thompson v. Wilder, 272 S.C. 563, 253 S.E.2d 108 (1979); Crawford v. Murphy, 260 S.C. 411, 196 S.E.2d 503 (1973); Rochester v. Holiday Magic, Inc., 253 S.C. 147, 169 S.E.2d 387 (1969); Brown v. Weathers, 251 S.C. 67, 160 S.E.2d 133 (1968).

130. Bledsoe v. Metts, 258 S.C. 500, 503-04, 189 S.E.2d 291, 293 (1972); Edwards v. Ferguson, 254 S.C. 278, 283, 175 S.E.2d 224, 226 (1970).